No. 14840.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SANTA CLARA LEMON ASSOCIATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SANTA CLARA LEMON ASSOCIATION,

Respondent.

Petition for Review and Petition for Enforcement of Order of National Labor Relations Board.

Brief of Petitioner, Santa Clara Lemon Association.

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TOPICAL INDEX

PAGE

Preliminary statement 1

A. Jurisdiction 1

B. Statement of the case 3

C. Specifications of error 4

Argument 5

I.

The Union is not the one elected by the employees and is not a bargaining representative of the employees' "own choosing" 5

II.

Granting the unilateral, general wage increase did not constitute an unfair labor practice 24

III.

Refusal to assign Luttrell to work in the packing section was not an unfair labor practice 26

IV.

Threatening statements 33

TABLE OF AUTHORITIES CITED

CASES PAGE

Aerovok Corp. v. N. L. R. B., 211 F. 2d 640, cert. den. 347 U. S. 968 17

Appalachian Electric Power Co. v. N. L. R. B., 93 F. 2d 986 ... 33

Bussman Mfg. Company v. N. L. R. B., 111 F. 2d 783 ..... 31, 33

Carson Pirie, Scott & Co., 69 NLRB 935 ..... 22, 23

Cleveland Graphite Bronze Company, 75 NLRB 61 35

Columbian Rope Co., 88 NLRB 1448 23

Consolidated Edison, etc. v. N. L. R. B., 305 U. S. 197 34

Dickey v. N. L. R. B., 217 F. 2d 652 ..... 17, 21

Foote Bros. Gear & Mach. Corp., In re, 14 NLRB 1045 22

Goodall Co., 86 NLRB 814 35

Jefferson Electric v. N. L. R. B., 102 F. 2d 949 33

Jenks, 81 NLRB 707 31

Martel Mills Corp. v. N. L. R. B., 114 F. 2d 624 32

Minnesota Mining & Mfg. Co., 81 NLRB 557 30

Montgomery Ward & Co., 39 NLRB 229 25

National Labor Relations Board v. Acme Air Appliance Co., 117 F. 2d 417 22

National Labor Relations Board v. Alco Feed Mills, 133 F. 2d 419 31

National Labor Relations Board v. American Pearl Button Co., 149 F. 2d 258 30

National Labor Relations Board v. Cape County Mill Co., 140 F. 2d 543 32

National Labor Relations Board v. National Shirt Shops, 212 F. 2d 491 22

National Labor Relations Board v. Norfolk Shipbuilding, 109 F. 2d 128 33

National Labor Relations Board v. Nylan-Sparta Company, 166 F. 2d 485 35

PAGE

National Labor Relations Board v. Union Pacific Stages, 99 F. 2d 153 32

National Labor Relations Board v. Virginia Power Company, 314 U. S. 469, 86 L. Ed. 348 35

National Labor Relations Board v. West Ohio Gas Co., 172 F. 2d 685 22

National Labor Relations Board v. Williamson-Dickie Mfg. Co., 130 F. 2d 260 33

National Labor Relations Board v. Youngstown Mines Corp., 123 F. 2d 178 22

Pennsylvania Labor Relations Board v. Kaufman Department Store, 345 Pa. 398, 29 A. 2d 90 32

Sax v. N. L. R. B., 171 F. 2d 793 35

Thomas v. Collins, 323 U. S. 516, 89 L. Ed. 430 35

Union Drawn Steel Co. v. N. L. R. B., 109 F. 2d 587 32

United States Gypsum Co., 93 NLRB 966 35

Wagner Electric Corp., 91 NLRB 220 23

Westchester Newspapers, Inc., 26 NLRB 630 25

RULES

Rules of the United States Court of Appeals, Ninth Circuit, Rule 34 2

STATUTES

Labor-Management Relations Act, 1947, Sec. 7 ..... 5, 17

Labor-Management Relations Act, 1947, Sec. 8(a)(1), (3), (5) 4

Labor-Management Relations Act, 1947, Sec. 10(f) 2

United States Code Annotated, Title 29, Sec. 141 2

United States Code Annotated, Title 29, Sec. 157 ..... 5, 17

United States Code Annotated, Title 29, Sec. 160(f) 2

United States Constitution, First Amendment 35

TEXTBOOK

1 Commerce Clearing House Labor Law Reporter (4th Ed.), Sec. 1110.08, p. 1145, Statement of Procedure, Sec. 101.8 34

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Petition for Review and Petition for Enforcement of Order of National Labor Relations Board.

Brief of Petitioner, Santa Clara Lemon Association.

Preliminary Statement.

A. Jurisdiction.

The matter to which review is sought consists of a Decision and Order dated April 13, 1955 [Tr.[1] 86-90],

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[1]Transcript of Record.

made by the National Labor Relations Board (hereinafter called the "Board") in a proceeding entitled *Santa Clara Lemon Association* (hereinafter called "Petitioner") *and United Fresh Fruit & Vegetable Workers, LIU No. 78, CIO* (hereinafter called "Fruit & Vegetable Union"), case numbers 21-CA-1851, 21-CA-1907 and 21-CA-1908, holding that petitioner had committed unfair labor practices and had refused to bargain with the said union [Tr. 86-90].

The Petition praying that the Order of the Board be set aside was filed under the provisions of Section 101.14 of the Rules and Regulations of the Board, and under the provisions of Section 10(f) of the Labor-Management Relations Act, 1947, and in compliance with Rule 34 of the Rules of the United States Court of Appeals for the Ninth Circuit, as amended effective January 1, 1949.

The above Act of Congress, approved June 23, 1947, known and designated as the "Labor-Management Relations Act, 1947" (29 U. S. C. A., Sec. 141), provides as follows as to review of this Order:

> "Sec. 10(f). Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside." (29 U. S. C. A., Sec. 160(f).)

B. Statement of the Case.

Petitioner is a California cooperative nonprofit association with its principal place of business in Oxnard, California, where it is engaged in processing and packing citrus fruits [Tr. 47].

On November 4, 1953, Petitioner's employees elected said Fruit & Vegetable Union as their bargaining representative [Tr. 6]. On November 13, 1953, the Board certified said Fruit & Vegetable Union as the employees' exclusive bargaining representative [Tr. 7-8].

Bargaining meetings were held between Petitioner and said Fruit & Vegetable Union on December 17, 1953, and January 14, 1954 [Tr. 73-74]. On January 14, 1954, a petition signed by about 70% of the employees and repudiating said Union was served on Petitioner [Tr. 74, 28-29]. Petitioner refused to bargain further [Tr. 279. Charges were filed by said Fruit & Vegetable Union against Petitioner on November 10, 1953, and on January 28, 1954 alleging discriminatory lay-offs, threats of lay-offs and refusal to bargain with said Union [Tr. 8-12]. Consolidated complaint was issued by the Board on or about May 27, 1954 [Tr. 13-17] and hearing was had before Trial Examiner Wallace E. Royster, in Oxnard, California, from September 13 through September 24, 1955 [Tr. 46].

Petitioner filed written Exceptions to the Trial Examiner's Findings that Petitioner committed unfair labor practices: (1) by refusal to bargain with said Fruit & Vegetable Union, (2) by granting a unilateral wage in-

crease, (3) by refusal to assign Jewell Luttrell to work on the grader, (4) that Petitioner negotiated with the employees committee, (5) that Petitioner threatened its employees because of their union activity and (6) to his recommendation that Petitioner bargain with the United Packinghouse Workers of America, Local 78, CIO (hereinafter referred to as the "Meatpackers Local") [Tr. 85, 81].

The Board affirmed the Rulings and Recommendations of the Trial Examiner and ordered Petitioner to bargain with the said Meatpackers Local [Tr. 86-89].

Petitioner thereafter filed its Petition for Review with the above entitled court [Tr. 95-98].

C. Specifications of Error.

The Board erred in affirming the Findings, Conclusions and Recommendations of the Trial Examiner as follows: (1) that the said Meatpackers Local is the exclusive bargaining representative of Petitioner's employees; (2) that Petitioner committed unfair labor practices by refusal to bargain with the said Meatpackers Local; (3) in recommending that in the future Petitioner bargain with the said Meatpackers Local; (4) that Petitioner discriminated against Jewell Luttrell because of her union activities; (5) that Petitioner threatened employees because of union activities; (6) that Petitioner committed unfair labor practices by making a unilateral wage increase; and (7) that Petitioner engaged in unfair labor practices within the meaning of 8(a)(1), (3) and (5) of the Labor-Management Relations Act [Tr. 79-80].

ARGUMENT.

I.

The Union Is Not the One Elected by the Employees and Is Not a Bargaining Representative of the Employees' "Own Choosing."

Employees have the statutory right "to bargain collectively through representatives of their own choosing." (Sec. 7, Labor-Management Relations Act, 1947, 29 U. S. C. A., Sec. 157.)

The instant point is presented in support of Petitioner's Exceptions to the Board's Findings and Conclusions that Petitioner committed unfair labor practices by refusal to bargain with said Meatpackers Local and its Order that Petitioner:

> "Upon request, bargain collectively with United Packinghouse Workers of America, Local 78, CIO, as the exclusive representative of the employees in the appropriate unit described above, and if an understanding is reached embody such understanding in a signed agreement." [Tr.* 89.]

On November 4, 1953, the Board conducted a consent-election [Tr. 6] in the matter of Petitioner and said Fruit and Vegetable Union.

The Fruit and Vegetable Union was certified by the Board on November 13, 1953, as the exclusive bargaining representative [Tr. 7-8].

Bargaining meetings were held between Petitioner and the Fruit and Vegetable Union on December 17, 1953, and January 14, 1954. At the January 14th meeting

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*Transcript of Record.

Petitioner's manager was served with an employees' petition repudiating said Fruit and Vegetable Union [Tr. 73-74, 195, 276-278, 28-30]. Petitioner refused to bargain further [Tr. 39, 278, 279]. Unfair labor practice charges were filed by said Fruit and Vegetable Union, and hearing was had in the instant case from September 13 to 24, 1954 in Oxnard, California [Tr. 46].

The Fruit & Vegetable Union, with headquarters in Salinas, California [Tr. 10] had a membership of approximately 18,000 [Tr. 237] with jurisdiction in fruit and vegetable packing houses throughout California and Arizona [Tr. 199]. It was a local industrial union affiliated directly with national CIO [Tr. 199]. Its officers were: Jim Smith, president; Lum Moorehead, vice-president; Helen Parker, secretary-treasurer [Tr. 234]. Its executive board consisted of: Ben Perry, Tex Bell and Herb Cornell [Tr. 234]. Its trustees consisted of: Pop Gandy, Clayton Coon and Dick Brashear [Tr. 234].

Beginning on March 1, 1954, the Fruit & Vegetable Union was operated under an administrator appointed by the national CIO [Tr. 234]. There was some indication of financial difficulties in the Fruit & Vegetable Union [Tr. 236]. The officers and their titles were removed on or about March 1, 1954, by the national CIO [Tr. 30].

On or about July 1, 1954: (1) the Fruit & Vegetable Union's charter and seal were cancelled by national CIO [Tr. 228]; (2) the Fruit & Vegetable Union was amalgamated with the 150,000-member United Packinghouse Workers of America, an international union affiliated with the CIO (hereinafter called the "Meatpackers International") [Tr. 31, 199-200]; (3) the Meatpackers International issued a new charter to said Meatpackers Local [Tr. 228, 229]; (4) the Meatpackers International ap-

pointed its vice-president, Anthony T. Stephens, as administrator in charge of the Meatpackers Local [Carp. ** Tr. 113-114]; (5) Mr. Stephens operated the Meatpackers Local from his offices in Chicago, Illinois, where the home offices of the Meatpackers International are located [Carp. **Tr. 114]; (6) the executive board of the Meatpackers International appointed Gilbert Simonson, an international representative of the Meatpackers International, as deputy administrator of the Meatpackers Local [Tr. 230; **Tr. 113, 121]; (7) Deputy Administrator Simonson works under the direction of Administrator Stephens [Carp. ** Tr. 117]; (8) Simonson came to the Meatpackers Local at Salinas, California, about July 15, 1954, after the amalgamation was effected [Carp. **Tr. 113, 121]; and (9) Simonson's residence and office are now in Salinas, California, where the principal office of the Meatpackers Local is located [Carp. **Tr. 113-114].

The Meatpackers Local has no officers or executive board, but operates solely under the Administrator and Deputy Administrator from the Meatpackers' International [Carp. **Tr. 118, 119]. Jim Smith, former president of the Fruit & Vegetable Union, was removed from office and is now a business agent in the Phoenix, Arizona area [Tr. 234; Carp. **Tr. 119]. Moorehead, former vice-president of the Fruit & Vegetable Union, was removed from office and is now a business agent in the Brentwood-Tracy, California area [Tr. 234; Carp. **Tr. 119]. Helen Parker, former secretary-treasurer of the Fruit & Vegetable Union, was removed from office and is now employed as a secretary in the Salinas office of the Meatpackers' Local [Tr. 234; Carp. **Tr. 119].

**Transcript in related case of *Carpinteria etc. v. N. L. R. B.*, No. 14823.

There was admittedly no Board-conducted election by which the employees in the bargaining unit voted to substitute the Meatpackers' Union (local or international) for the Fruit & Vegetable Union. There is not one scintilla of evidence that the employees in the bargaining unit had notice of any new election or held a unit election or took a unit vote on the matter. Nevertheless, the Board finds employee approval, as follows:

> "The record in this and four companion cases (112 NLRB Nos. 18, 19, 20 and 21) shows and the Trial Examiner found that after the refusal to bargain, the Union, by a membership vote which included the Respondent's employees, voted to affiliate with United Packinghouse Workers of America, and the name of the Union was changed to United Packinghouse Workers of America, Local 78, CIO. The record also establishes, without contradiction, that a large number of employees in the unit voted; that the vote was unanimous for the affiliation; and that the CIO cancelled the Union's original charter. Pursuant to the authority of the consent election agreement, the Regional Director thereupon amended the certification to substitute the new name of the Union. We find that the Regional Director did not act arbitrarily or capriciously in the circumstances." [Tr. 87, footnote 3.]

The only evidence of employee approval is that there was an area union membership meeting held in Oxnard, California, in March, 1954, to which the membership from the five[2] citrus packinghouses were invited; that each of

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[2]Santa Clara Lemon Association, Seaboard Lemon Association, Somis Lemon Association, Oxnard Citrus Association and Carpinteria Lemon Association.

the packinghouses was well represented; that there were "about 130, 150 people at the meeting;" and that there was a "unanimous vote for affiliation or amalgamation with the Packinghouse Workers" (*i.e.* said Meatpackers International) [Tr. 201-204]. Each packing house is a separate bargaining unit. The evidence is that no count was taken as to the number of persons present. There is no evidence that minutes were kept of such a meeting [Tr. 203]. The evidence does not show whether there were ten, twenty, a hundred or none at all there from Petitioner. If there were 150 present and the packing houses were equally represented, there would have been 30 employees from each packing house. The evidence indicates that at the meeting none of the bargaining units voted separately as a unit. Actually, therefore, Petitioner or any one of the other four bargaining units might have had, and probable did have, far less than a majority of its eligible voters present to participate in the vote. The total number of eligible voters in the five bargaining units at the time of the November, 1953, Board election was 366:

71—Santa Clara [Tr. 6]
87—Seaboard, Case No. 14824 [Tr. 6]
56—Somis, Case No. 14839 [Tr. 6]
85—Oxnard, Case No. 14838 [Tr. 6]
67—Carpinteria, Case No. 14823 [Tr. 6]

366 total

The Tally of Ballots indicates that of the 71 eligible voters in the Petitioner employing unit, 23 voted against the Fruit & Vegetable Union at the Board-conducted election [Tr. 6].

Employees who were not members of said Fruit & Vegetable Union were probably not present at the meeting

since this was a union "membership" meeting [Tr. 201-202]. There was no "union shop" or other contract between Petitioner and said Fruit & Vegetable Union. A minority group of union members in the bargaining unit could not by their votes at a union membership meeting appoint a union bargaining representative different from the one chosen at a Board-conducted election by a majority of the employees in the bargaining unit.

Moreover, there is substantial evidence that the majority of the employees in the bargaining unit of Petitioner did not desire to be represented by the Fruit & Vegetable Union or by the Meatpackers' Union (International or Local).

On January 14, 1954 Petitioner was served with a petition signed by 50 of the 64 employees, who voted in the Board election [Tr. 6], repudiating the Fruit & Vegetable Union and stating that they wished to be represented by a committee of employees in their own group [Tr. 28-30, 277-279]. Again on August 20, 1954 the employees who signed the petition filed with the National Labor Relations Board a Motion to Intervene in the instant proceeding and an affidavit in support thereof [Tr. 23-32]. In the affidavit the said employees stated that:

> "(7) None of the employees represented by the Employees' Committee desire to be represented by Local #78, CIO, or by its parent organization or by any of its affiliates or successors, now or at any time. . . .
>
> "(8) Local #78, CIO, and its affiliates no longer represent a majority of the production and maintenance employees of the Employer."

* * * * * * * *

"(10) . . . that on or about March 1, 1954, all of the managing officers of said Local #78, CIO, were removed from office by order of the CIO National Union and a temporary Administrator placed in charge of said Local #78, CIO.

"By reason of the facts herein alleged and for other necessary and incidental reasons, it would not be for the best interest of any of the employees represented by the said committee to be represented by Local #78, CIO, or its parent organization or any of its affiliates or successors or to members thereof."

* * * * * * * *

"(12) The Employees' Committee is informed and believes and therefore alleges that the Local #78, CIO, is presently insolvent, defunct, inoperative and unable to carry on its usual business affairs and is attempting to transfer its functions, operations and membership to a meatpackers' international union CIO affiliate . . . It would not be for the best interests of the employees or any of them to be represented by or members of any meatpackers' union because Employer's operations are confined solely to harvesting, washing and packing of fresh perishable citrus fruits, which operation is wholly unrelated to the processing and packing of meat." [Tr. 25-27.]

The said affidavit also contained the following exhibits:

"Exhibit 'B'

"San Francisco Examiner

"CIO Head Takes Over Local Union

Salinas, March 3, 1954:—(AP) An administrator from national offices of the Congress of Industrial Organizations has taken charge of Local 78 of the United Fresh Fruit and Vegetable workers and all local office titles have been set aside.

"The administrator, Ken Gillie, sent here by National CIO President Walter P. Reuther, said the union, with a membership of more than 2500, still was solvent and would continue functioning. There had been unconfirmed reports of financial difficulties." [Tr. 30.]

"EXHIBIT 'C'

"LOS ANGELES EXAMINER

Sunday, July 19, 1954

"CIO IN FARM WORK FIELD

15,000-MEMBER LOCAL 78 JOINS BIG, ACTIVE PACKING UNION

By Harry Bernstein

"New life soon may be injected into long-dormant plans to organize agricultural workers into labor unions, it was revealed here yesterday with the announcement of the merger of two Congress of Industrial Organizations unions.

"The small, 15,000-member Fresh Fruit and Vegetable Workers Local Industrial Union 78 has voted to join the 150,000 member Packinghouse Workers, according to John Janosco, Packinghouse field representative here." [Tr. 30-31.]

The said motion to intervene was renewed by Donald A. Pollack, attorney for the said Employees Committee at the hearing [Tr. 110]. Following denial of the motion, Attorney Pollack made an "offer of proof" of the contents of said affidavit [Tr. 110].

The National Labor Relations Board hearing on alleged unfair labor practices of the employer started in Oxnard, California on September 13, 1954 and ended on September 24, 1954 [Tr. 46, 109, 330]. One of the alleged

unfair labor practices was the employer's refusal to bargain with the Fruit & Vegetable Union after January 14, 1954 [Tr. 14]. On September 7, 1954, the Fruit & Vegetable Union, by its last acting officer, and the Meatpackers' Local, acting through Deputy Administrator Simonson, jointly filed with the Board a motion to amend the certification naming the Meatpackers' Local as the exclusive bargaining agent in the place of the Fruit & Vegetable Union [Tr. 33-34]. On September 9, 1954, the Regional Director issued a Notice to Show Cause in writing on or before September 21, 1954 why he should not amend the certification by substituting the Meatpackers' International and the Meatpackers' Local for the Fruit & Vegetable Union [Tr. 35]. On September 14, 1954 the Petitioner filed opposition to the motion and demanded a hearing [Tr. 36]. On September 21, 1954 (in the midst of the hearing in the instant case), and without a hearing, the Regional Director amended the certification naming the Meatpackers' Local as the exclusive bargaining agent in the place of the Fruit & Vegetable Union [Tr. 42-43].

At the beginning of the hearing, on September 13, 1954, the attorney for the General Counsel moved to amend the Complaint, as follows:

> "Mr. Cherry: Now, at this time I would like to make a motion to amend the complaint by inserting a paragraph. We could make it Paragraph 5-A, that on or about July 1, 1954, the United Fresh Fruit & Vegetable Workers Union LIU #78, CIO, *was taken over and absorbed* by the United Packinghouse Workers of America, Local 78, CIO, a sister organization.
>
> Trial Examiner: You have stated the amendment?

Mr. Cherry: Yes.

Trial Examiner: All right, go ahead.

Mr. Cherry: The purpose of this amendment is in the event that the Trial Examiner and the Board should find a refusal to bargain did exist at the time of the complaint, any remedial order which would then flow to the unit requiring the responsibility to bargain would be in favor of the *new union,* the United Packinghouse Workers, in the future. However, if there be no finding in the past that they refused to bargain with them except in a continuing proposition, there's no allegation at that time in the complaint. Allegations of the refusal to bargain are much earlier [Tr. 111].

* * * * * * * *

Trial Examiner: Yes, Well, of course, the amendment merely states what the General Counsel states to be a fact, the absorption of LIU #78, CIO, by the Packinghouse Workers. *Now, what flows from that as a legal result? Whether that relieves the employer of any responsibility for bargaining because of such a change is a further and different question.* But I have in mind that you intend the amendment of the complaint to state the alleged facts." [Tr. 112.] (Emphasis added.)

The amendment was granted over the Petitioner's objections [Tr. 112, 113].

The following summary of the pertinent facts and the law clearly illustrates a change of union without the employees' consent: (1) Petitioner consented to a Board election with the Fruit & Vegetable Union on the ballot [Tr. 1-5]; (2) a majority of the employees voted for the Fruit & Vegetable Union on November 4, 1953 [Tr. 6]; and it was duly certified by the Board on

November 13, 1953 [Tr. 7-8]; (3) Petitioner did not consent to an election having the Meatpackers' International or the Meatpackers' Local on the ballot [Tr. 1-5]; (4) the employees did not vote for the Meatpackers' International or the Meatpackers' Local [Tr. 6]; (5) no second election was held after the November 4, 1953 election; (6) the employees in Petitioner's production unit had a basic statutory right to express their choice; (7) their choice was expressed in favor of the Fruit & Vegetable Union but not in favor of the Meatpackers' International or the Meatpackers' Local [Tr. 6]; (8) the Meatpackers' International amalgamated with the Fruit & Vegetable Union, and in the process absorbed the latter [Tr. 111, 30-31, 199-200; Carp. **Tr. 114, 121]; (9) in the amalgamation the charter and seals of the Fruit & Vegetable Union were cancelled, its office titles were set aside, its officers were removed [Tr. 30-31, 234-235; Carp. **Tr. 118, 119, 121]; (10) following the merger the Meatpackers' International was in complete and exclusive control through Administrator Stephens and Deputy Administrator Simonson [Carp. **Tr. 116-119, 121]; (11) the Meatpackers' International chartered, set up and operated through its new Meatpackers' Local, which it maintained in an administratorship status [Tr. 235; Carp. **Tr. 113, 117-119, 121]; (12) the administrator of the Meatpackers' Local is Anthony T. Stephens, a vice-president of the Meatpackers' International [Carp. **Tr. 113]; (13) Mr. Stephens operates from his offices in Chicago, Illinois where the home offices of the Meatpackers' International are located [Carp. **Tr. 114]; (14) the deputy administrator of the Meatpackers' Local is Gilbert Simonson, who is an international representative of the Meatpackers' International [Carp. **Tr. 113];

(15) Simonson's appointment as deputy administrator was made by the executive board of the Meatpackers' International, which is his employer [Carp. **Tr. 121]; (16) Simonson works under the direction of Administrator Stephens [Carp. **Tr. 117]; (17) Simonson's offices and those of the Meatpackers' Local are in Salinas, California [Carp. **Tr. 113-114]; (18) the Meatpackers' International has 150,000 members as compared with 18,000 members in the Fruit & Vegetable Union [Tr. 31, 237]; (19) the Fruit & Vegetable Union had complete control of the union for which the employees voted on November 4, 1953—they have no control of the amalgamated union, either International or Local; (20) the charges in the instant action were filed by the Fruit & Vegetable Union [Tr. 10], and not by the Meatpackers' Union (Local or International).

The employees in the instant case voted to bargain collectively through the Fruit & Vegetable Union [Tr. 6]. They have never voted to bargain through a union whose official representation gives control to an organization other than the Fruit & Vegetable Union. In the instant case, and in the absence of a second election, every detail of administration and control was arbitrarily taken over by the 150,000-member Meatpackers' International from the 18,000-member Fruit & Vegetable Union. The Fruit & Vegetable Union has disappeared as an entity. Deputy Administrator Simonson doesn't even know what offices or officers were in the Fruit & Vegetable Union [Carp. **Tr. 121].

The new Meatpackers' Local controls neither administrative details, nor policy—such matters are under the exclusive control of the Meatpackers' International acting through Administrator Stephens and Deputy Administrator Simonson [Carp. **Tr. 113, 114, 116-117].

The Board-conducted election is the administrative medium through which the employees in the bargaining unit are entitled to exercise their choice. In the instant case there was no second Board election at which the employees in the bargaining unit were permitted to choose whether or not they wanted either a meatpackers' international or a meatpackers' local to act as their bargaining representative. In the absence of the employees' expression of their choice in a second Board-conducted election, they have been denied their basic statutory right "to bargain collectively through representatives of their own choosing." (Sec. 7 of the Labor Management Relations Act, 1947, 29 U. S. C. A., Sec. 157.)

The Regional Director, Twenty-first Region, exceeded the authority of the Act by amending the certification thereby naming as bargaining agent the Meatpackers' International and the Meatpackers' Local, neither of whom had been duly elected by the employees in the bargaining unit. Nothing in the Agreement for Consent Election [Tr. 1-5] can lawfully, nor does, authorize the Board, the Union or Petitioner to substitute a bargaining representative different from the one elected by the employees in the bargaining unit at the Board-conducted election. The National Labor Relation Board has no more authority than the employer to dictate to employees what labor organization shall represent them. (*Aerovok Corp. v. N. L. R. B.*, 211 F. 2d 640, cert. den. 347 U. S. 968.)

In *Dickey v. N. L. R. B.* (C. A. 6, 1955), 217 F. 2d 652, the facts are analogous and the language of the court seems to be clearly applicable to the instant case.

There the Board conducted a consent election. The Blacksmith's International (AFL) was certified by the

Board on February 2, 1953 as the exclusive bargaining representative. Contract negotiations were carried on between the employer and the Blacksmith's Union until July 8, 1953. The Blacksmith's Union filed unfair labor practice charges against the employer.

On July 7, 1953 the Blacksmith's Union (AFL) merged with the Boilermaker's International Union (AFL), which had a much larger membership than the Blacksmith's. On the basis of membership, the Blacksmith's were allotted three out of a total of sixteen vice presidents.

On August 31, 1953, after the unfair labor practices had occurred, motion was filed with the Regional Director of the Board to amend the certification of election by substituting the Boilermaker's for the Blacksmith's. The motion was granted. Appeal was taken to the Board and denied. The Board upheld the Trial Examiner's finding that the situation represented only a change of name, and that under the merger the Blacksmith's did not lose their identity as representatives of the employees.

The Court of Appeals reversed the Board and held that by amending the certification the Regional Director had certified as an exclusive bargaining representative a union which had been in no way concerned with the election. The language of the court is as follows:

> ". . . However, as to the Boilermakers, the order commands the employer to bargain with a union which did not file the charge and on the conceded facts was never chosen by the employees as their exclusive bargaining representative. The court thinks that under these circumstances the employer was under no obligation to bargain with the Boilermakers and that enforcement of this part of the order must be denied."

* * * * * * * *

"The question is squarely presented whether, by amendment of the certification of representation, the Regional Director is authorized to substitute as exclusive bargaining representative a union different from the one actually chosen by the men and certified. The Regulations of the Board, Series 6, as amended, Section 102.54, authorize the Regional Director to issue a certification of the results of the election and provide that the 'rulings and determination by the regional director of the results thereof shall be final.' The Agreement for Consent Election entered into by the employer provides that 'the determination of the Regional Director shall be final and binding upon any question, including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election,' and provides further that 'rulings or determinations by the Regional Director in respect of any amendment of any certification resulting therefrom shall also be final.' It is clear from this context that under the Regulations the authority of the Regional Director to amend a certification must relate to the election. But here the Regional Director certified as exclusive bargaining representative a union which had been in no way concerned with the election."

* * * * * * * *

". . . An employer cannot by dealing with a union constitute it the lawful representative of employees who have not chosen it to represent them. The history of the decisions of the Supreme Court of the United States as to company unions demonstrates this fact. Nor can the identity of the union agent who is negotiating with the employer decide which union is the exclusive bargaining agent of the men. The vote of the employees is the decisive factor in securing 'that freedom of choice which is

the essence of collective bargaining.' International Ass'n of Machinists, etc. v. N. L. R. B., 311 U. S. 72, 79, 61 S. Ct. 83, 88, 85 L. Ed. 50.

"Section 7 of the Labor Management Relations Act, 1947, 29 U. S. C. A. §157, provides that 'Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing * * *.' This is the basic provision of the Labor Management Relations Act. Here the men voted for the Blacksmiths and the result was duly certified. They did not vote for the Boilermakers. No second election was held after that certified February 2, 1953. The fact that the union representative said he told the employees that merger proceedings were pending is immaterial. The employees had a basic statutory right to express their choice. It was expressed in favor of the Blacksmiths but not in favor of the Boilermakers.

"Here it is conceded that another and different organization amalgamated with the Blacksmiths. In the merger the officers were divided between the constituent organization proportionately according to membership. While the numbers are not given, many more individuals were members of the Boilermakers and Ship Builders than of the Blacksmiths, for when the offices were divided upon a basis proportional to membership three out of sixteen vice presidents were allotted to the Blacksmiths. (Boilermakers-Blacksmiths Journal, *supra.*)

"The Blacksmiths were a fraction only, although a substantial fraction, of the resulting membership of the Boilermakers.

"Moreover, the official management of the new union was not confided to the Blacksmiths. They

had only three vice presidents. The president and the secretary-treasurer and thirteen vice presidents were originally members of the Boilermakers. The Blacksmiths had complete control of the union which the employees joined. They had no control of the amalgamated union.

* * * * * * * *

"Here the facts are undisputed and the law is plain. The men voted to bargain collectively through the Blacksmiths. They have never voted to bargain through a union the majority of whose members did not belong to the Blacksmiths, and whose official representation gives control to another organization than the Blacksmiths. The amendment of the certification of election by the Regional Director was unauthorized and the Board could not validate it by its approval."

The controlling facts in the instant case are substantially similar to the facts of the *Dickey* case. In substance in the instant case we now have single-handed operation of the Meatpackers' Local by the Meatpackers' International through the latter's officers whom it has appointed administrator and deputy administrator of the Meatpackers' Local. All officers of the Fruit & Vegetable Union have been removed from office, its charter and seals have been cancelled, and in the amalgamation this union has completely disappeared as an entity.

As further evidence that all of the officers of the Fruit & Vegetable Union had been removed, deputy administrator Simonson testified that he was appointed after the Meatpackers' International had taken over, and that he did not know what offices or officers had been in the Fruit & Vegetable Union [Carp. **Tr. 121].

It is well established that when the union ceases to exist as the same legal entity, its authority as bargaining representative is terminated. (*N. L. R. B. v. National Shirt Shops* (C. A. 5, 1954), 212 F. 2d 491; *N. L. R. B. v. West Ohio Gas Co.* (C. A. 6, 1949), 172 F. 2d 685; *N. L. R. B. v. Acme Air Appliance Co.* (C. A. 2, 1941), 117 F. 2d 417; *N. L. R. B. v. Youngstown Mines Corp.* (C. A. 8, 1941), 123 F. 2d 178.)

In re Foote Bros. Gear & Mach. Corp. (1939), 14 NLRB 1045, the Board held that where there was a shift in national affiliation, under circumstances which indicated that the old union ceased to exist as the same entity, its authority as bargaining representative was terminated.

In the instant case the record does not show how many of Petitioner's employees, if any, were members of the Meatpackers' Union (Local or International) after revocation of the charter of the Fruit & Vegetable Union. There is no showing in the instant case that a majority, or any, of Petitioner's employees were members of the Meatpackers' Union (International or Local) after receipt of its charter. The record does show that approximately 52 [Tr. 29-30] of Petitioner's 71 eligible voters [Tr. 6] indicated that they did not wish to be members of the Meatpackers' Union (Local or International) [Tr. 27]. Such facts indicate that the Meatpackers' Union (International or Local) was never designated by Petitioner's employees as their bargaining representative. Therefore Petitioner was under no duty to recognize or bargain with the Meatpackers' Union (Local or International).

However, in *Carson Pirie, Scott & Co.* (1946), 69 NLRB 935, the Board held that a local union's change of national affiliation from CIO to AFL was a sufficient change of circumstances to warrant a new election within

one year. In the *Carson Pirie* case, Local 291, CIO was certified on October 23, 1945. On January 25, 1946, Local 291, AFL petitioned for an election, which was granted. The new AFL local retained its former name, its number, its executive board, and its local officers, but obtained a new charter from AFL. In granting the petition for an election the Board said (at p. 938):

> "Here the effect of the employees' action in voting to disaffiliate with Local 291, CIO, and form Local 291, AFL, was to change the very character of their bargaining representative and to raise a doubt as to the actual identity of the Union certified by the Board on October 23, 1945.
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> ". . . the unresolved doubt as to the identity of the bargaining representative serves to retard the stability in labor relations which it is the primary policy of the Act to promote. Accordingly, we find that the Board's certification of October 23, 1945, cannot operate to bar a present determination of representatives."

In *Wagner Electric Corp.* (1950), 91 NLRB 220, the Board denied a Motion to Amend Certification by substituting the name of the moving union for that of the certified union, and held that questions concerning representation must be resolved by petition and secret ballot.

In *Columbian Rope Co.* (1950), 88 NLRB 1448, where substantial doubt was created as to identity of employees' representative by union's merger and subsequent transfer of affiliations, the Board denied the request to amend the certification and directed an election to resolve the doubt.

Under the facts heretofore stated it is clear that the Meatpackers union (International or Local) was not the union elected by Petitioner's employees and that Petitioner therefore committed no unfair labor practices by its refusal to bargain with said Meatpackers' Union. It is further apparent that Petitioner cannot be compelled to bargain with the Meatpackers' Union (Local or International) in the future in the absence of a Board-conducted election whereby a majority of the employees vote by secret ballot to elect the Meatpackers' Union as their bargaining representative.

For the reasons heretofore stated the Board's Order that Petitioner bargain collectively with the Meatpackers' Local Union is contrary to law and in violation of the rights of the employees, and the Board's finding that Petitioner failed and refused, contrary to the Act, to bargain with the Meatpacker's Local Union should be reversed.

II.

Granting the Unilateral, General Wage Increase Did Not Constitute an Unfair Labor Practice.

It was stipulated that general wage increases were made in January 27, 1954 and on April 24, 1954 [Tr. 207-208]. Petitioner admits that it did not consult any Union about either of the wage increases [Tr. 300].

It is not disputed that bargaining sessions were between the Fruit & Vegetable Union and Petitioner on December 17, 1953 and January 14, 1954 [Tr. 195]. It is also undisputed that there were no meetings between any Union and Petitioner after the employees' petition [Tr. 28] was served on Petitioner on January 14, 1954 [Tr. 197-198]. The reasons why there were no further bar-

gaining meetings have been discussed at length in the preceding section of this brief.

Petitioner stood between the demands of the Fruit & Vegetable Union on one side and the demands of a majority of its employees on the other [Tr. 300-301]. Wage adjustments were made to meet the competition of other packing houses [Tr. 294]. The new wage rates of $1.15 for women and $1.40 for men were ascertained by checking with other packing houses to determine what they were paying [Tr. 292-293]. The wage increases were made retroactive to September 28 because that was the time when the competitive packing houses had raised wages [Tr. 301].

The Trial Examiner considers that "the reason for making the wage increase in the circumstances outlined to be immaterial" [Tr. 75]. The Board has not been so arbitrary. It has held that unilateral wage increases may be made when bargaining negotiations were in suspension.

In regard to the effect of a "suspension" of negotiations, the Board declared:

> "In these circumstances the respondent was under no duty to withhold normal action respecting wages pending consultation with the Union." (*Montgomery Ward & Co.,* 39 NLRB 229; *Westchester Newspapers, Inc.,* 26 NLRB 630.)

In the instant case we have negotiations suspended as a result of the conflicting demands of the Fruit & Vegetable Union on one side and of a majority of the employees and unusual circumstances on the other. How soon the difficulty would be resolved by the Board, or by a Court, or both, could not be foreseen. It might take a month, a year, or even two or three years. In the meantime the employees

would be deprived of a wage adjustment to which they were admittedly entitled because of the July, 1953, major change in operations—this matter had been under study since July, 1953 [Tr. 299]. Petitioner's labor supply would have been jeopardized by its inability to meet competitive wage rates. Should both Petitioner and the employees be penalized by a frozen wage scale throughout the period necessary to resolve the legal conflict?

Petitioner did the only thing that it could reasonably do under the circumstances. It made unilateral wage increases [Tr. 294].

III.

Refusal to Assign Luttrell to Work in the Packing Section Was Not an Unfair Labor Practice.

The Complaint charges that from on or about September 9, 1953, to the present Petitioner has discriminated against Jewell Luttrell by temporary lay-offs [Tr. 15, par. 7].

The discriminatory lay-offs charged are based on the fact that Luttrell was sent home when the washer was not operating rather than being assigned to grading fruit, in the packing side of the shed. Luttrell's testimony negatives such a contention. She admits that she was not a packer [Tr. 151]. She testified that the operation slows down from September until January [Tr. 154], and that the rush period is from March until June [Tr. 149]; that she was called to work whenever the washer was running [Tr. 162]; that she got overtime during the rush periods [Tr. 149, 154-155]; that in July, 1953, the new volume-fill operation was installed which eliminated all piece work and reduced the girls' washer crew from 34-36 to about 20 [Tr. 120-122, 160-162]; that when this

change-over occurred she was assigned to a new job by herself on the washer in July, 1953 [Tr. 120]; that prior to the change-over in July, 1953, she had worked in the packing section when the washer wasn't operating [Tr. 122], and since the change-over in July, 1953, she did grading in the packing section only one day which was September 16, 1953 [Tr. 152, 153]; that when the previous foreman quit in June, 1953, she was put on the washer picking culls [Tr. 152], and the biggest part of her work had been on the washer [Tr. 151]; that at one time she was assigned to picking culls because, by her own admission, there wasn't any other worker at the time who knew how to pick them out [Tr. 150]; that she did the above described work on the washer until February 15, 1954, when she was assigned to the pre-sort belt where she worked with three other girls, all of whom had been employed at Petitioner for quite a while [Tr. 162-163]; and that her union activity at Petitioner did not begin until August 11, 1953 [Tr. 156-159].

The complaining witness's own testimony indicates that the July, 1953, change in operations was the cause of the change in her job assignment, all of which occurred prior to any union activity which started in August, 1953. General Counsel's witness Venegas, testified that she had been regularly employed by Petitioner as a grader since April, 1953, and that Luttrell had not worked in the grading section at any time since April, 1953 [Tr. 179-182]. The grader foreman testified that Luttrell had not worked in the grading section after March, 1953 [Tr. 209], because he had told the house foreman that he did not want her in the grading section [Tr. 210].

It should be noted here that on September 16, 1953, the only day that Luttrell claims to have worked on the

grader since July, 1953 [Tr. 152-153], the grader foreman who did not want her in the grading section, was away on vacation [Tr. 211-212]. Even giving full credit to Luttrell's testimony, the mere fact that someone temporarily in charge of the grading section used her for a day, does not reverse Petitioner's policy and practice (and of the grading foreman, in particular) since March, 1953, of not using her in the grading section at any time.

The washer foreman, Lockner, testified that the last time he saw Luttrell grading in the packing section was in March, 1953 [Tr. 306-307]. The testimony of General Counsel's rebuttal witnesses, Lievsay [Tr. 313-314] and Solano [Tr. 317], who testified that they saw Luttrell working in the grading section in the middle of September, 1953, was in conflict with the testimony of his own witnesses Luttrell and Venegas mentioned above. Solano testified that she personally had not worked at Petitioner after Labor Day, 1953, or possibly a week before that [Tr. 318].

Luttrell admitted that the house foreman told her that one of the reasons that she would not be sent to grade in the packing section was that some of the women did not want her there [Tr. 128-129]. This is confirmed by the testimony of the house foreman, Sayre [Tr. 255-256, 218-219], and by the testimony of the grader foreman, Barnes [Tr. 210].

All of the above evidence, including the testimony of Luttrell, is contrary to the Trial Examiner's finding that:

> "after September 14, 1953 . . . Respondent, through Sayre, followed a policy of refusing to permit her to work on the grader at such times that the washer was shut down; *that this practice was a reversal of that which had been observed prior* to the

time when the Respondent became aware of Luttrell's Union interest; and that it was a discriminatory retaliation against her because of her leadership in the organizing campaign." (Emphasis added.) [Tr. 71-72.]

There is no evidence of "reversal" of policy or practice after April, 1953, or, at the latest, July, 1953. The mere accident that under a very temporary grading foreman Luttrell may possibly have worked in the grading section one day in September, 1953, does not establish that there was any policy or practice of using her in grading after April or July, 1953.

The changes made in Luttrell's work occurred in July, 1953, and the reasons therefor were explained to her. In fact there is substantial evidence, including the testimony of General Counsel's own witness, that Luttrell did no work in the packing section after April, 1953. Petitioner's house foreman. Sayre, did not know about any union activity at Petitioner until the latter part of October, 1953 [Tr. 263]. Fuller, the manager, did not observe evidence of union activity at Petitioner prior to October, 1953 [Tr. 282], and on about September 15, 1953, he received a letter from the Fruit & Vegetable Union [Tr. 281]. The house foreman, Sayre, did not know until shortly before or shortly after the plant election (November 4, 1953) that Luttrell was active in the Fruit & Vegetable Union [Tr. 260]. There is no evidence that the manager, Fuller, had any knowledge of Luttrell's Union activities prior to the receipt of the Union letter of November 6, 1953 [Tr. 37], naming her as shop steward [Tr. 268].

The evidence indicates that the change of job assignment of which Luttrell complains, namely, using her only on the washer, occurred long before there was any Union

activity at Petitioner and long before Petitioner's management had any knowledge of her Union activities. She was kept out of the packing section after March, 1953, on order of the packing foreman, and in July, 1953, she was told why she could not return to work in the packing section. Neither Petitioner's manager nor its house foreman had any knowledge of Luttrell's Union activities prior to October, 1953, and they did not know until November, 1953, that she was a shop steward. Using the evidence most favorable to the General Counsel, namely, that the last time she worked in the packing section was one day in September [when the packing foreman was on vacation—Tr. 211] but not later than September 16, 1953, that is still prior to the time that Petitioner's management had any knowledge of her Union activities, and is two months before Petitioner knew that she was a shop steward.

The Act does not purport to affect the normal right of the employer to select, lay off, or discharge his employees. He has the right to exercise his judgment as to which employees should best be retained or recalled. Whether or not the employer in the exercise of his managerial judgment is just or unjust, wise or unwise, is not a matter of concern, and the Board's inquiry must be confined to the question as to whether or not the employees have been discriminated against because of their Union activities or affiliations. (*N. L. R. B. v. American Pearl Button Co.* (C. A. 8), 149 F. 2d 258.) In the absence of any knowledge by employer of employee's Union membership, discriminatory motivation for lay-off is not established. (*Minnesota Mining & Mfg. Co.,* 81 NLRB 557.) Even though employer knew of employee's Union membership, a lay-off is not discrimina-

tory where small amount of Union activity engaged in by an employee was unknown to the employer. (*Jenks,* 81 NLRB 707.) Where the lay-off is made for business reasons and resulted from change of job assignment which occurred prior to Petitioner's knowledge of the employee's Union activities, such lay-off is not discriminatory. (*N. L. R. B. v. Alco Feed Mills* (C. A. 5), 133 F. 2d 419.)

Luttrell admits that she worked whenever the washer was operating, and that she received considerable overtime. Since her job assignment to the washer alone occurred long prior to Petitioner's knowledge of Union activity in the plant, and of her Union activity in particular, none of the lay-offs in connection with her work on the washer can be said to be discriminatory.

The General Counsel contends that Luttrell's temporary lay-offs were because of her Union activities. Petitioner contends that her lay-offs were because of her change in job assignment which occurred long before there was any known Union activity either by Luttrell or other employees.

In *Bussman Mfg. Company v. N. L. R. B.* (C. A. 8, 1940), 111 F. 2d 783, where the General Counsel contended that a man was discharged for union activity and the employer contended that the man was discharged because of refusal to work, the court said:

> "When the testimony shows, as it does here, that the cause of the discharge may have been one of two things, one of which was illegal and the other legal, the fact finding tribunal cannot guess between the two causes and find that union activities were the real cause when there is no satisfactory foundation in the testimony to support the conclusion.

Patton v. Texas & Pacific Railway Company, 179 U. S. 658, 663, 21 S. Ct. 275, 45 L. Ed. 361. When evidence is consistent with either of two inconsistent hypotheses it establishes neither. *Stevens v. The White City,* 285 U. S. 195, 204, 52 S. Ct. 347, 76 L. Ed. 699; *New York C. R. Company v. Ambrose,* 280 U. S. 486, 490, 50 S. Ct. 198, 74 L. Ed. 562. Under these circumstances, had the case been tried by a jury, it would have been the duty of a trial judge to direct a verdict for the defendant. *Chicago M. & St. Paul Ry. Company, v. Coogan,* 271 U. S. 472, 478, 46 S. Ct. 564, 70 L. Ed. 1041; *Massachusetts Protective Association v. Mouber,* 8 Cir., 100 F. 2d 203, 206."

The National Labor Relations Act is not intended to empower the Board to substitute its judgment for that of the employer in the conduct of its business. (*N. L. R. B. v. Union Pacific Stages* (C. A. 9, 1938), 99 F. 2d 153), quoted with approval in *Martel Mills Corp. v. N. L. R. B.* (C. A. 4, 1940), 114 F. 2d 624), or to interfere with the employer's right to conduct its own business. (*N. L. R. B. v. Cape County Mill Co.* (C. A. 8, 1944), 140 F. 2d 543.) The Act does not vest in the Board managerial authority. (*N. L. R. B. v. Union Pacific States, supra*); *Pennsylvania Labor Relations Board v. Kaufman Department Store* (1942), 345 Pa. 398, 29 A. 2d 90.)

In *Union Drawn Steel Co. v. N. L. R. B.* (C. A. 3, 1940), 109 F. 2d 587, the Court said:

> "The right of the employer, for general economic reasons, to make use of a smaller staff to operate his business, to decrease his production, or to go out of business entirely if he desires to do so, we regard as indubitable. For example, if an employer

has employed ten men to operate ten machines, he may, for such reasons employ only nine men to operate the ten machines or he may operate only nine machines with only nine men, or, if he chooses, he may cease all operations. This right must be deemed to be one of the employer's weapons in the general economic struggle."

The evidence in support of a finding must be substantial, and surmise or suspicion is not enough. (*N. L. R. B. v. Williamson-Dickie Mfg. Co.,* 130 F. 2d 260.) The test for substantial evidence is not satisfied by evidence which gives equal support to inconsistent inferences. (*Appalachian Electric Power Co. v. N. L. R. B.,* 93 F. 2d 986; *Bussman Mfg. Co. v. N. L. R. B.,* 111 F. 2d 783.) Since there is no substantial evidence to support the allegations of discriminatory lay-offs as against Luttrell, the findings must be for Petitioner (*N. L. R. B. v. Norfolk Shipbuilding,* 109 F. 2d 128; *Jefferson Electric v. N. L. R. B.,* 102 F. 2d 949).

For the foregoing reasons the Board's findings that there were discriminatory lay-offs as to Luttrell are not supported by substantial evidence and should be reversed.

IV.

Threatening Statements.

It is alleged that Roger Sayre, the packinghouse foreman, made certain specific threatening and coercive statements to employees on November 2 and 6, 1953 [Tr. 16]. In the absence of allegations therefor, evidence of other threatening and coercive statements by Sayre or others on the alleged dates, or at other times, would be wholly irrelevant and immaterial to any of the issues in this proceeding.

There is a denial of due process of law when the issues are not clearly defined and the employer is not fully advised of them. (*Consolidated Edison, Etc. v. N. L. R. B.*, 305 U. S. 197.) The Board has recognized the necessity of specific charges in its Statements of Procedure, Section 101.8 (1 Commerce Clearing House Labor Law Reporter (4th Ed.), Sec. 1110.08, p. 1145).

General Counsel's witnesses attribute numerous statements to Sayre about Union matters. Most of them differ entirely and completely from the content or substance of the threats or coercive statements specifically alleged. The evidence as to when any particular statement was made is, with few exceptions, very vague and indefinite.

The numerous statements attributed to Sayre, Fuller and others were on their face—both by date and content—wholly immaterial and irrelevant to the charges alleged in the Consolidated Complaint [Tr. 16]. The only threatening statement attributed to Sayre on November 6, 1953 is said by the Trial Examiner to have been made sometime in October [Tr. 52-53]. Not one statement of Sayre or Fuller, as summarized by the Trial Examiner, occurred on November 2 or 6, 1953, or on any dates close to that. It is very doubtful whether any of the statements summarized by the Trial Examiner, or which appear elsewhere in the record, contains in substance or effect any of the specific threats or coercive statements alleged in the Complaint. Several conversations were recalled by Sayre, but discussions as to Union matters or threats because of Union activity were denied in their entirety. In fact, the evidence is that after on or about September 15, 1953 the entire management was under orders not to discuss Union matters with employees [Tr. 271, 40, 285, 303, 259].

Where there are conflicting versions of supervisor's statements, and the speaker's vagueness makes statements susceptible of multiple interpretations, and not all of them coercive, the Board has refused to isolate one version of the testimony in order to support a finding of violation of the Act. (*U. S. Gypsum Co.,* 93 NLRB 966.) Statements that the employer "didn't want" the Union at the plant and that "nobody could make them pay more than 53¢ an hour" were held too obscure to warrant a finding that they were coercive. (*Goodall Co.,* 86 NLRB 814.) In the absence of statement clearly threatening or coercive, remarks or queries by employers to employees come within the protection of free speech guaranteed by the First Amendment to the Constitution. (*N. L. R. B. v. Virginia Power Company,* 314 U. S. 469, 86 L. Ed. 348; *Thomas v. Collins,* 323 U. S. 516, 89 L. Ed. 430; *Sax v. N. L. R. B.* (C. A. 5), 171 F. 2d 793, 794.) An employer has the right to express his views concerning the advantages and disadvantages of the Union. (*N. L. R. B. v. Nylan-Sparta Company* (C. A. 6), 166 F. 2d 485.) Casual conversations with employees regarding Union matters generally do not constitute unfair questioning or interference by the employer. (*Cleveland Graphite Bronze Company,* 75 NLRB 61.)

For the foregoing reasons the Board's findings as to threatening statements by Sayre should be reversed.

Respectfully submitted,

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